

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MELINDA ROSE COOPERSMITH, )  
 ) No. CV-10-279-JPH  
Plaintiff, )  
 ) ORDER GRANTING IN PART  
v. ) PLAINTIFF'S MOTION FOR  
 ) SUMMARY JUDGMENT AND  
MICHAEL J. ASTRUE, Commissioner ) REMANDING FOR FURTHER  
of Social Security, ) ADMINISTRATIVE PROCEEDINGS  
 )  
Defendant. ) (ECF No. 13)  
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On August 23, 2010, plaintiff filed a complaint (ECF No. 1, 4). The parties have consented to proceed before a magistrate judge (ECF No. 6). Plaintiff moved for summary judgment on January 10, 2010 (ECF No. 13); Defendant, on February 22, 2011 (ECF No. 15). Defendant's memorandum in support of his motion for summary judgment includes a request for dismissal of the complaint (ECF No. 16 at 8). On March 7, 2011, plaintiff replied (ECF No. 17).

**ISSUES**

On December 17, 2009, the ALJ issued an unfavorable decision (Tr. 14-25). On July 22, 2010, the Appeals Council (AC) denied plaintiff's request for review (Tr. 1-3). Plaintiff asks the court to review the Appeals Council's denial of her request for review (ECF No. 14, 17 at 1-2). She asserts the AC erred by denying review before (1) giving plaintiff the chance to present

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1 additional evidence, and (2) providing a hearing tape or  
2 transcript to review in order to present briefing to the AC.  
3 Plaintiff asks the court to vacate the Appeals Council's decision  
4 denying review so that she can obtain a hearing tape or  
5 transcript, submit briefing, and, if appropriate, additional  
6 evidence to the Appeals Council; alternatively, she asserts if  
7 there is no record of the prior hearing, she should be given a new  
8 hearing at the ALJ level (ECF No. 14). The administrative record,  
9 including the transcript of the hearing before the ALJ on October  
10 13, 2009, was filed on October 29, 2010, about three month after  
11 the AC denied review (ECF No. 10; see Tr. 32-60). The transcript  
12 is now clearly available to plaintiff's counsel. Plaintiff alludes  
13 to having asked the Appeals Council "for an extension of time  
14 [sic] CD of the actual hearing," but this is unclear in the  
15 record. Plaintiff does not specifically assign error to the ALJ's  
16 decision.

17 The Commissioner asserts (1) the court "must dismiss this  
18 case because it lacks subject matter jurisdiction to review the  
19 action of the [AC] denying Plaintiff's request for review"; (2) on  
20 March 10, 2010, the Appeals Council sent the duplicate recordings  
21 requested by plaintiff's counsel (Tr. 9), and plaintiff failed to  
22 follow up with the Appeals Council for four months, from the date  
23 the hearing record was sent in March until the AC denied review on  
24 July 22, 2010 (ECF No. 16 at 3,5-6).

#### 25 DISCUSSION

26 Under the Social Security Act, a claimant may seek judicial  
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1 review of "any final decision... made after a hearing to which he  
2 was a party." 42 U.S.C. § 405(g); see also 42 U.S.C. § 1383 (c)(3)  
3 (The final determination of the Commissioner of Social Security  
4 after a hearing... shall be subject to judicial review... to the  
5 same extent as the Commissioner's final determinations under  
6 section 405). There is no "final decision" in a Social Security  
7 case until the Appeals Council either grants or denies review.  
8 *Bass v. Social Sec. Admin.*, 872 F.2d 832, 833 (9<sup>th</sup> Cir. 1989)(per  
9 curiam). The Appeals Council may deny the request for review,  
10 making the ALJ's decision final, or review the case and make a  
11 decision. 20 C.F.R. §§ 404.967, 404.981. Plaintiff argues the AC  
12 should consider additional briefing and evidence before making a  
13 final determination.

14 The Appeals Council denied review on July 22, 2010 (ECF No.  
15 1-3), stating in part

16 "If you disagree with our action, you may ask for court  
17 review of the Administrative Law Judge's decision by filing a  
18 civil action."  
19 (ECF No. 2).

20 As noted, plaintiff is not challenging the ALJ's decision at  
21 this point.

22 Defendant asks the court to dismiss the complaint. A  
23 complaint may be dismissed pursuant to Fed. R. Civ. P. 12(b)(1)  
24 for lack of subject matter jurisdiction. In the context of Social  
25 Security Appeals, federal court jurisdiction depends on whether  
26 the action by the Appeals Council constitutes a final decision  
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1 under section 405(g). *Matlock v. Sullivan*, 908 F.2d 492, 493 (9<sup>th</sup>  
2 Cir. 1990); 42 U.S.C. § 405(g). The term "final decision" is not  
3 defined by the Act, and "its meaning is left to the [Commissioner]  
4 to flesh out by regulation." *Weinberger v. Salfi*, 422 U.S. 749,  
5 767 (9175); see also *Matlock*, 908 F.2d at 493.

6 The court has jurisdiction to consider a denial, but not a  
7 dismissal, by the Appeals Council. *Matlock*, 908 F.2d at 493-494.

8 For the sake of argument, even if the court accepts the  
9 Commissioner's argument plaintiff is attempting to appeal a  
10 nonfinal decision (that of the AC denying review), the only  
11 nonfinal decision the court can review is the denial of a petition  
12 to reopen that is challenged on constitutional grounds, see  
13 *Califano v. Sanders*, 430 U.S. 99, 109 (1977), an exception that  
14 appears to apply in this case. Plaintiff was not afforded due  
15 process when the AC arguably failed to timely provide an  
16 intelligible hearing record, and then denied review before counsel  
17 was given an opportunity to review the record and submit briefing  
18 and additional evidence. Accordingly,

19 **IT IS ORDERED:**

20 1. Plaintiff's motion for summary judgment (**ECF No. 13**) **is**  
21 **granted in part, pursuant to sentence four. The case is remanded**  
22 **to the Appeals Council for further proceedings.**

23 2. Defendant's motion for summary judgment (ECF No. 15) and  
24 motion to dismiss the complaint for lack of subject matter  
25 jurisdiction (ECF No. 16 at 8) are **denied**.

26 3. Judgment shall enter for plaintiff.

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DATED this 23<sup>rd</sup> day of June, 2011.

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